



August 30, 2018

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Ryan Zinke
Secretary
U.S. Department of Interior
1849 C St., NW
Washington, D.C. 20240

Glenda Owens
Acting Director
U.S. Office of Surface Mining Reclamation and Enforcement
1849 C St., NW
Washington, D.C. 20240

**RE: Notice of Intent to File Suit Over Failure to Perform Mandatory Duty Under
Surface Mining Control and Reclamation Act**

Dear Secretary Zinke and Acting Director Owens:

Pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1270(a)(2), WildEarth Guardians (“Guardians”) hereby notifies you of its intent to file suit over your failure to perform a duty under SMCRA that is not discretionary. Specifically, Guardians intends to file suit against the U.S. Department of Interior and the U.S. Office of Surface Mining Reclamation and Enforcement (“OSMRE”) over your failure to promptly promulgate regulations to limit toxic blasting emissions at coal mines after granting a petition for rulemaking.

Background

Under SMCRA, any person may petition OSMRE for the “issuance, amendment, or repeal of a rule” under SMCRA. 30 U.S.C. § 1211(g)(1); *see also* 30 C.F.R. § 700.12(a). Pursuant to this, on April 18, 2014, WildEarth Guardians submitted a petition to OSMRE to amend regulations at 30 C.F.R. §§ 816.67 and 817.67. The petition requested the agency amend its regulations in order to limit emissions of toxic gases produced during blasting at surface coal mining operations. The petition specifically called on OSMRE to amend its regulations to limit the production of lethal visible nitrogen oxide (“NOx”) emissions, which manifest in the form of orange to red clouds at surface coal mining operations.

After requesting and considering public comment and after thoroughly reviewing WildEarth Guardians' request, OSMRE granted the petition. In a public notice, OSMRE stated, "After reviewing the petition and supporting materials, and after careful consideration of all comments received, the Director has decided to grant the petition." 80 Fed. Reg. 9,256, 9,257 (Feb. 20, 2015).

If a rulemaking petition is granted under SMCRA, OSMRE "shall promptly commence an appropriate proceeding[.]" 30 U.S.C. § 1211(g)(4); *see also* 30 C.F.R. § 700.12(d)(2) (stating that OSMRE "shall initiate a rulemaking proceeding" upon granting a petition). Accordingly, in granting WildEarth Guardians' petition, OSMRE stated, "we intend to propose regulatory changes to ensure that operators and regulatory authorities prevent injury to people and damage to property from any harm that could result from all toxic gases generated by blasting at coal mines, including NO_x and carbon monoxide (CO)." *Id.*

More than three years after granting WildEarth Guardians' petition, OSMRE has taken no steps to amend its regulations. In fact, although the agency was poised to follow through with a proposed rulemaking, in the spring of 2017, the agency announced it had "withdrawn" its rulemaking initiative. *See* Exhibit 1, U.S. Office of Information and Regulatory Affairs, Withdrawal of RIN 1029-AC71, available online at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1029-AC71> (last accessed August 29, 2018). Effectively, OSMRE has decided that it does not intend to follow through with any rulemaking.

Violation of SMCRA

As of the date of this notice letter, OSMRE has failed to "promptly commence" a rulemaking proceeding after granting WildEarth Guardians petition, in violation of 30 U.S.C. § 1211(g)(4) and 30 C.F.R. § 700.12(d)(2). OSMRE has not only failed to promptly commence a rulemaking proceeding, but also made an explicit decision in 2017 to not move forward with rulemaking.

OSMRE's duty to "promptly commence" a rulemaking proceeding after granting a rulemaking petition is not discretionary under SMCRA. Once a rulemaking petition is granted, the agency must "promptly" act. Under SMCRA, the agency must not delay a rulemaking or otherwise make a decision to not follow through with commencing a rulemaking proceeding.

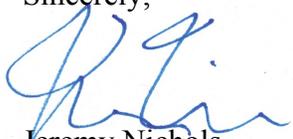
Accordingly, the Secretary and OSMRE have failed to perform an act or duty that is not discretionary under SMCRA. Pursuant to 30 U.S.C. § 1270(a)(2), WildEarth Guardians intends to file suit against the Secretary and OSMRE to compel action to commence a rulemaking.

By this letter, Guardians provides notice of its intent to file suit in federal court after 60 days if OSMRE does not promptly commence a rulemaking proceeding in response to its 2014 rulemaking petition. Pursuant to 30 C.F.R. § 700.13(b), notice is being provided by U.S. Certified Mail to the Secretary and the Director of OSMRE. In accordance with 30 C.F.R. § 700.13(f), the name, address, and telephone number of the person giving notice is as follows:

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
2590 Walnut St.
Denver, CO 80205
(303) 437-7663
jnichols@wildearthguardians.org

If you have any questions or concerns, please contact me at the information above

Sincerely,



Jeremy Nichols
WildEarth Guardians

Exhibit 1

RIN Data

DOI/OSMRE

RIN: 1029-AC71

Publication ID: Spring 2017

Title: Toxic Gases and Blasting

Abstract:

This rule would require surface coal mining operators to prevent injury to people and damage to property from any harm that could result from toxic gases generated by blasting at coal mines, including nitrogen oxide (NOx) and carbon monoxide (CO), and would define "blast area" to ensure areas affected by blasting are properly secured and that the public is adequately protected. This agenda item is being withdrawn at the present time to allow the Department to assess the action further and determine whether rulemaking is appropriate. Following such an assessment, the Department may determine that certain rules listed as withdrawn under this agenda are appropriate for promulgation. If that determination is made, such rules will be included in a succeeding semiannual agenda under a new RIN.

Agency: Department of the Interior(DOI)

Priority: Substantive, Nonsignificant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Completed Actions

Major: No

Unfunded Mandates: No

EO 13771 Designation:

CFR Citation: [30 CFR 816](#) [30 CFR 817](#)

Legal Authority: [5 U.S.C. 553\(e\)](#) [30 U.S.C. 1211\(c\)\(2\)](#)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
Withdrawn	03/27/2017	

Regulatory Flexibility Analysis Required: No

Government Levels Affected: None

Small Entities Affected: No

Federalism: No

Included in the Regulatory Plan: No

RIN Data Printed in the FR: No

Agency Contact:

Joshua Rockwell

Mining Engineer

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

1951 Constitution Avenue NW.,

Washington, DC 20240

Phone:202 208-2633

Email: jrockwell@osmre.gov